

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN C. CARVER,

Plaintiff,

V.

ALBERTO R. GONZALES, UNITED STATES
ATTORNEY GENERAL,

Defendant.

No. C06-1045MJP

**ORDER ON DEFENDANT'S
MOTION TO DISMISS**

This matter comes before the Court on Defendant's motion to dismiss (Dkt. No. 5). Having reviewed the parties' briefing, as well as all pertinent documents and exhibits, the Court DENIES Defendant's motion, without prejudice to renewal. The Court ORDERS the parties to conduct a settlement conference with a neutral third party prior to filing any further motions in this case. The parties will file a joint status report containing the date of the settlement conference within ten (10) days of the date of this order. The Court also GRANTS Plaintiff's request to strike new arguments raised for the first time in sections III.A and III.B of Defendant's reply brief.

Background

Plaintiff John Carver is seeking a Writ of Mandamus from this Court ordering Defendant Alberto R. Gonzales to process Plaintiff's retirement from the Department of Justice ("DOJ"), and to forward his retirement paperwork to the United States Office of Personnel Management ("OPM").

1 Plaintiff worked 17 years for the DOJ before leaving in December 1994. In June 1996,
2 Plaintiff applied to return to the United States Attorney's Office ("USAO") in Seattle as an Assistant
3 United States Attorney ("AUSA"); however, the USAO hired a younger attorney instead. Plaintiff
4 sued the DOJ for age discrimination. On September 25, 2002, the EEOC held that the DOJ had
5 discriminated against Plaintiff based on his age and ordered DOJ to hire Plaintiff as an AUSA.

6 DOJ appealed the decision to the Office of Federal Operations ("OFO"), the appellate body for
7 the EEOC in federal sector claims. On August 8, 2005, the OFO affirmed the findings of age
8 discrimination. By a letter dated October 11, 2005, Mark Bartlett of the Seattle USAO offered
9 Plaintiff a position as an AUSA, which he accepted on November 8, 2005. In December 2005, Mr.
10 Bartlett sent Plaintiff an early retirement plan, under which Plaintiff would be considered to have been
11 hired retroactively on September 29, 1996, and then to have retired from DOJ as of June 1, 2005.
12 Plaintiff accepted retirement, and DOJ paid him \$262,304.16 in back pay on January 6, 2006.

13 On February 7, 2006, Andrew Niedrick, an attorney with the Executive Office for United
14 States Attorney ("EOUSA"), informed Plaintiff that the processing of his federal retirement was
15 dependent upon payment of the amounts DOJ claimed Plaintiff owed as an offset against his back pay
16 award. Plaintiff filed a Petition for Enforcement with the EEOC on February 28, 2006, asking the
17 EEOC to clarify the back pay offset issues. Neither side, however, has submitted a copy of the
18 Petition for the Court to review. To date the EEOC has not issued a decision on the Petition.

19 Plaintiff has now been "retired" for more than one year (since June 1, 2005). He has not
20 received payment of his retirement annuity, and he has not been admitted to the Federal Employees
21 Health Benefits program. Plaintiff asks the Court to issue a Writ of Mandamus to compel Defendant
22 to process his retirement from DOJ, and to forward it to the OPM.

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Analysis

I. Standard for Motion to Dismiss

Defendant has moved to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For a motion to dismiss, material allegations are taken as true, and courts must construe the complaint in the light most favorable to the plaintiff. Keniston v. Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983). A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) addresses the court's subject matter jurisdiction. In determining subject matter jurisdiction, courts may consider materials outside the pleadings. Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996).

On a 12(b)(6) motion, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Doe v. United States, 419 F.3d 1058, 1062 (9th Cir. 2005).

II. Ripeness and Exhaustion

Defendant argues that the Court should dismiss Plaintiff's complaint on ripeness and exhaustion grounds.

A. Ripeness

Courts are traditionally reluctant to exercise jurisdiction over administrative determinations unless they “arise in the context of a controversy ‘ripe’ for judicial resolution.” Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967). The ripeness doctrine prevents courts “from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized.” Id. at 148. To determine ripeness, courts evaluate “both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” Id. at 149. For “fitness,” courts look at whether the agency’s actions or inactions challenged in the lawsuit are “final,” and whether the issues presented are primarily legal as opposed to factual. Id. at 149-51. Unripe claims are properly dismissed under Fed. R. Civ. P. 12(b)(1). Bland v. Fessler, 88 F.3d 729, 732 n.4 (9th Cir. 1996).

1 The record presented is insufficient for the Court to decide the issue of ripeness. Both parties
2 focus on the Petition for Enforcement to argue ripeness. Defendant argues that the Petition makes the
3 complaint unripe because the calculation of the retirement annuity and the processing of paperwork
4 depend on the resolution of the offset issue. Hence, Defendant argues that for the Court to order the
5 processing of paperwork before the EEOC rules on the offset issue would be to interfere with an
6 agency action that is not final. Plaintiff, in contrast, argues that the resolution of the Petition will not
7 affect the calculation of retirement annuity or the processing of paperwork, and that the Court need
8 not wait for a final decision from the EEOC because the complaint and the Petition are two separate
9 actions. However, the Court is unable to properly evaluate either party's argument because the
10 Petition is not in the record for review. Therefore, the Court declines to decide the ripeness issue on
11 the record presented.

12 **B. Exhaustion**

13 Reiter v. Cooper defines the doctrine of exhaustion of administrative remedies as “[w]here
14 relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that
15 avenue of redress before proceeding to the courts, and until that recourse is exhausted, suit is
16 premature and must be dismissed.” 507 U.S. 258, 269 (1993). There are two types of exhaustion:
17 mandatory and prudential. Mandatory exhaustion does not apply in this case because Defendant has
18 not argued a congressional requirement for exhaustion. Absent mandatory exhaustion, courts may
19 require prudential exhaustion if: “(1) agency expertise makes agency consideration necessary to
20 generate a proper record and reach a proper decision; (2) relaxation of the exhaustion requirement
21 would encourage deliberate bypass of the administrative scheme; and (3) administrative review is likely
22 to enable the agency to correct its own mistakes and preclude the need for judicial review.” Montes v.
23 Thornburgh, 919 F.2d 531, 537 (9th Cir. 1990).

24 On the record presented, the Court will not require prudential exhaustion. It is possible that
25 the EEOC's expertise is necessary; a relaxation of exhaustion may encourage deliberate bypass of the

1 administrative scheme; or an administrative review is likely to enable the agency to correct its own
2 mistakes. However, the Court cannot make any of the determinations above without reviewing the
3 Petition for Enforcement and establishing the exact nature and scope of the Petition. Therefore, the
4 Court will not consider prudential exhaustion until it reviews the Plaintiff's Petition for Enforcement.

5 **III. Plaintiff's surreply to strike**

6 Plaintiff has filed a surreply asking the Court to strike new arguments Defendant raised for the
7 first time in sections III.A and III.B of his reply. The Court grants this request. It is well-established
8 that courts will not consider new arguments raised for the first time in a reply brief. Lentini v.
9 California Center for the Arts, Escondido, 370 F.3d 837, 843 n.6 (9th Cir. 2004).

10 **Conclusion**

11 The Court cannot decide the issues of ripeness and exhaustion on the record before it.
12 Accordingly, the Court denies Defendant's motion, without prejudice to renewal. The Court grants
13 Plaintiff's request to strike new arguments raised for the first time in sections III.A and III.B of
14 Defendant's reply. Additionally, before any further motions are filed in this case, the Court will
15 require the parties to conduct a settlement conference with a neutral third party. The parties must file
16 a joint status report containing the date of the settlement conference within ten (10) days of the date of
17 this order.

18 The Clerk is directed to send copies of this order to all counsel of record.

19 Dated: November 30, 2006

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21 s/Marsha J. Pechman
22 Marsha J. Pechman
23 United States District Judge
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